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No. 82-1889

THE SUPREME COURT OF THE UNITED STATES

October Term, 1982

SPRINGFIELD TOWNSHIP SCHOOL DISTRICT, a political subdivision of the Commonwealth of Pennsylvania; ROMAN, LOUIS A., Superintendent, Springfield Township School District; LAWN, JOHN J., HANSHAW, MARIE M., COMMINS, JAMES A., GOREN, SARA LEE, HOCH JR., WILLIAM C., HOGUE JR., E. BURKE, KALISH, SALLY, LIEBERMAN, MAX L. AND TOBIN, HARPUR M., Individually and as members of the Board of School Directors, Springfield Township School District,
Petitioners

v.

KNOLL, MADELIN H.,
Respondent

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF OF PETITIONERS

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QUESTION PRESENTED FOR REVIEW

May a state six-month statute of limitations governing judicial actions against public officials which would otherwise be applicable and bar a Section 1983 claim of employment discrimination on the basis of sex, be disregarded on the ground that it is inconsistent with the federal policy underlying the cause of action under consideration?

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Third Circuit as well as its order denying rehearing and statement of Judge Adams sur denial of Petition for Rehearing are reported as *Knoll vs. Springfield Township School District*, 699 F.2d 137 (3d Cir. 1983); they are set forth in the Appendix to the Petition for Writ of Certiorari at A1 and A31, respectively. The opinion and order of the United States District Court for the Eastern District of Pennsylvania is not reported; it is set forth in the Appendix to the Petition at A19.

JURISDICTIONAL STATEMENT

(1) The judgment sought to be reviewed was filed on January 27, 1983.

(2) An order denying rehearing was entered on February 23, 1983.

(3) 28 U.S.C. Section 1254(a) confers jurisdiction on this Court to review the judgment in question by Writ of Certiorari filed within ninety (90) days after entry of the order denying rehearing. See 28 U.S.C. Section 2101(c); Supreme Court Rule 20.4.

(4) The Petition for Writ of Certiorari was filed on May 20, 1983.

STATUTORY PROVISIONS

This case involves the following statutory provisions:

(1) Section 1 of the Civil Rights Act of 1871, as amended, 42 U.S.C. Section 1983, which provides as follows:

CIVIL ACTION FOR DEPRIVATION OF RIGHTS

Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, in equity, or other proper proceeding for redress.

(2) 42 U.S.C. Section 1988, which provides as follows:

PROCEEDINGS IN VINDICATION OF CIVIL RIGHTS

The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of this chapter and Title 18, for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution

and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty.

(3) Section 5522 (b)(1) of the Pennsylvania Judicial Code, 42 Pa.Cons.Stat. Section 5522 (b)(1), which provides:

(b) Commencement of Action Required — the following actions and proceedings must be commenced within six months:

(1) An action against any officer of any government unit for anything done in the execution of his office, except an action subject to another limitation specified in this subchapter.

(4) Section 5527(6) of the Pennsylvania Judical Code, 42 Pa.Cons.Stat. Section 5527(6) which provides:

SIX YEAR LIMITATION

The following actions and proceedings must be commenced within six years:

. . . (6) Any civil action or proceeding which is neither subject to another limitation specified in this subchapter nor excluded from the application of a period of limitation by Section 5531 (relating to no limitation).

STATEMENT OF THE CASE

Respondent, Madelin Knoll, commenced this suit on April 21, 1981 to redress alleged discrimination on the basis of sex by her employer, the School District of Springfield Township (the "School District"). One of her claims sought relief under 42 U.S.C. Section 1983. In the alternative, Ms. Knoll sought relief under Section 703 of the Civil Rights Act of 1964, as amended, 42 U.S.C. Section 2000e-2 ("Title VII"). See Appendix to Petition for Writ of Certiorari, at A36.[1] Under Plaintiff's theory of the case, the last act of discrimination occurred in September 1980 when a man was appointed to the position of Assistant Superintendent — a position for which she had not applied.[2] The School District Defend-

1. References to the Appendix to the Petition for Writ of Certiorari are cited "A ____", and references to the Joint Appendix as "JA ____".

2. The facts underlying the Title VII and Section 1983 claims, as pleaded in Ms. Knoll's Complaint, are as follows: Ms. Knoll was awarded a doctorate degree in 1968 and was certified by the Pennsylvania Department of Education as qualified to serve in the following positions in the public schools: elementary teacher, reading specialist, supervisor of reading, elementary principal and district superintendent. (A39, at par. 16). In July 1979 she applied for a vacancy as Administrative Assistant to the Superintendent, a position for which she was qualified and certified. (*Id.*, at par. 17). On August 2, 1979 she was notified by the Superintendent that she had not been selected as Administrative Assistant but that a male applicant had been appointed. Ms. Knoll claims he had less qualifications and lacked the appropriate certification. (*Id.*, at par. 18). At that time, Ms. Knoll also claims the Superintendent promised her that he would create an administrative position for her during the 1979-1980 school year. This was not done. Instead, on about May 28, 1980, the Superintendent notified her, by letter, that no such position would be created for her either that year or during the school year 1980-1981. (A39-A40; at par. 19). In September 1980 the Administrative Assistant was appointed Assistant Superintendent. (A40, at par. 20). Ms. Knoll asserted that all of these events resulted from a continuing policy of discrimination against her on the basis of sex. (A40, at par. 21-22). The Complaint also included aver-

dants moved for summary judgment on the ground that the Section 1983 claim was barred by the Pennsylvania six-month statute of limitations governing certain actions against public officials.[3] The District Court agreed.[4]

ments that Ms. Knoll had filed a charge with the EEOC on December 12, 1980 and that the EEOC had issued her a right to sue letter on January 28, 1981. (A41, par. 27-28). A copy of the charge and the right to sue letter were attached as exhibits to the Complaint. (*Ibid*; A43-A45). The EEOC charge appended to the Complaint included the following characterizations of her claim:

> . . . Because I was denied the position of Administrative Assistant, coupled with Respondent's failure to create an administrative position for me, as promised, I was denied the opportunity to be considered for the position as the Assistant Superintendent in September.
>
> * * *
>
> It is my belief that had I been selected for the position of Administrative Assistant in July 1979, I would have been promoted to Assistant Superintendent in September 1980.

(A43-A44, JA3)

The charge was dismissed by the EEOC "because it was untimely filed." (A47; JA4).

3. 42 Pa.Cons.Stat. Section 5522(b)(1). The School District Defendants also moved for summary judgment with respect to Ms. Knoll's Title VII claim on the ground that it too was time barred by her failure to file timely charges with the EEOC.

4. The District Court also agreed with the School District and the EEOC that Ms. Knoll's Title VII claim had been untimely filed. The School District's defense was premised on the theory that the only acts of discrimination occurred, if at all, in July 1979 when a man was appointed to the position of Administrative Assistant or on May 28, 1980 when Ms. Knoll was given notification that she would not, either at that time or at any time during the 1980-1981 school year, be brought on a parity with or promoted above the position of Administrative Assistant. In substance, the School District urged, in accord with *Delaware State College vs. Ricks*, 449 U.S. 250 (1980) and *United Airlines, Inc. vs. Evans*, 431 U.S. 553 (1977) that the man's promotion in September 1980 was consistent with and was a mere eventual effect of those prior decisions. This was, in fact, the same view expressed by Ms. Knoll in her charge before the EEOC.

The Court of Appeals, in a panel decision, reversed the dismissal of the Section 1983 claim on the ground that the Pennsylvania six-month limitation period was so short as to be inherently inconsistent with the policies to be fostered by the Federal Civil Rights Acts. *Knoll vs. Springfield Township School District*,[5] supra, The School District Defendants applied for rehearing. The application was denied, with four judges voting to grant rehearing en banc. *Knoll*, supra, at 146. Judge Adams, writing on behalf of the dissent, noted that the panel's decision conflicted with the decisions of the First and Eighth Circuits and that the panel's opinion failed to follow this Court's "direction" that it was "to give weight to the significant policies underlying the state statute of limitations." *Knoll*, supra, at 146-147. The dissent further took issue with the panel's failure to explain "with any precision" why the limitations period could not be squared with the policies underlying the civil rights statutes, stating:

> The panel has made no attempt to demonstrate with specific reference to the facts of this case that six

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NOTE — (*Continued*)
(See n. 2, supra; JA3). As noted above, the District Court agreed with this view of the case and dismissed both the Title VII and Section 1983 claims.

5. The Third Circuit reversed as to both Ms. Knoll's Title VII and Section 1983 claims. In doing so, it held that her assertion in paragraph 22 of the Complaint that the decisions not to promote her were the result of a "continuing policy of discrimination" was sufficient to preserve the claims' viability and declined to pierce that assertion so as to prevent the mere continuity of her employment or the mere occurrence of the inevitable effect of a past act from prolonging the life of her cause of action. The School District argued before the Third Circuit below that such a ruling would be contrary to the holdings in *Delaware State College vs. Ricks*, supra and *United Airlines, Inc. vs. Evans*, supra. The correctness of the Circuit Court's ruling regarding the Title VII claim is not now before the Court. Cf. Supreme Court Rule 34.1(a).

> months was insufficient for the plaintiff to file a Complaint. Instead, without citing any evidence or empirical data, it speaks of this period as being too limited for the "average plaintiff." (Citation omitted). The panel does not even rely on the special nature of employment discrimination cases; it appears to indicate that six months is too short in *all* types of section 1983 actions. Thus, the panel seemingly would make it impossible to borrow a six-month statute even in section 1983 actions that easily could be commenced within six months.

(*Id.* at 147-148; emphasis in original; footnote omitted).

SUMMARY OF ARGUMENT

The statute at issue in this case — a six-month statute of limitations applicable to certain actions against public officials, including actions for discrimination in employment on the basis of sex — would have applied to the Complainant and would have barred her claim had she brought suit under state law, in state court. Therefore, this case does not present a question of whether the six-month statute of limitations is the "appropriate" one to be applied in the case. The only question is whether the six-month period provided by the statute is inconsistent with the federal Constitution and laws.

Based on the provisions of 42 U.S.C. Section 1988 and a long unbroken line of decisions of this Court, the inquiry regarding whether that statute is "inconsistent" with federal law should be narrow. It should be confined to a determination of whether the statute either discriminates against federal rights or provides so short a time that it would effectively preclude litigating a claim.

In this case, there is no question of discrimination, as the statute applies to both state and federal claims and was enacted with no discriminatory intent with respect to federal claims. Thus, the statute satisfies the first prong of the test. Similarly, the decisions of this Court and the several circuit courts below which have squarely answered the question, have, without hesitation, applied six-month limitation periods to claims as complex as the one at issue here.

In substance, therefore, there is no foundation from which to draw a conclusion that the Pennsylvania six-month statute of limitations either discriminates against federal claims or is so unreasonably short as to preclude access to the courts to an aggrieved party. If the court is to adhere to its prior reasoning and the intent of Congress set forth in 42 U.S.C. Section 1988, it must permit the application of Pennsylvania's six-month statute of limitations to civil rights claims.

ARGUMENT

WHERE A STATE LEGISLATURE HAS DETERMINED THAT CERTAIN JUDICIAL ACTIONS AGAINST PUBLIC OFFICIALS — SUCH AS SUITS BASED ON ALLEGED EMPLOYMENT DISCRIMINATION ON THE BASIS OF SEX — SHOULD BE BARRED IF NOT COMMENCED WITHIN SIX MONTHS OF THEIR ACCRUAL, THE LEGISLATURE'S DETERMINATION THAT A SIX MONTH LIMITATION PERIOD WAS REASONABLE FOR THE COMMENCEMENT OF SUITS OF THAT SORT SHOULD NOT BE DISREGARDED.

This case squarely presents the Court with the question of whether a state statute of limitations applicable to the commencement of judicial proceedings should be disregarded in a 1983 suit solely on the ground that the limitation period — six months — is per se unreasonably short and, consequently, "inconsistent with the Constitution and laws of the United States."[6] 42 U.S.C. Section 1988.

There is no question in this case that the statute at issue was properly identified as the "most appropriate" state statute of limitations — "that [period of limitations] which the State would apply if the action had been brought in state court."[7] See *Knoll vs. Springfield Township School District*, supra; *Clyde vs. Thornburgh*, 533 F.Supp. 279 (E.D. Pa. 1982); *Eshmont vs. Commonwealth*, ____ Pa. Commonwealth Ct. ____ (No. 1390 C.D. 1981, filed November 24, 1981). The federal courts must therefore turn to this state statute of limitations in actions brought under Section 1983 and other civil

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6. *Johnson vs. Railway Express Agency, Inc.*, 421 U.S. 454, 462 (1975); *Burnett vs. Grattan*, ____ U.S. ____, ____ No. 83-264 (June 27, 1984), slip op. at 6.

7. *Johnson vs. Railway Express Agency, Inc.*, supra, at 469 (Marshall, J., concurring in part and dissenting in part); *Burnett vs. Grattan*, supra, slip op. at 7.

rights statutes unless it is inconsistent with the Constitution and laws of the United States.[8] In making that determination, the Court should limit its inquiry to whether the statute discriminates against federal causes of action or fails to give a party a reasonable time to sue.[9]

Although it has not been held squarely by the Court that discrimination against federal causes of action or the unreasonableness of the time to sue are the only grounds for disregarding a state statute of limitations for inconsistency with the federal constitution and laws, the reasoning of the Court in *Board of Regents vs. Tomanio*, 446 U.S. 478 (1980) ("*Tomanio*"), *Robertson vs. Wegmann*, 436 U.S. 584 (1978) ("*Robertson*"), and *Johnson vs. Railway Express Agency, Inc.*, 421 U.S. 454 (1975) ("*Johnson*") indicates that these are the proper boundaries for judicial review. See also, *Burnett vs. Grattan*, ____ U.S. ____, at ____, n. 15, No. 83-264 (June 27, 1984), slip op. at 11, n. 15 ("*Burnett*").

First, under *Tomanio*, "state statute(s) of limitations . . . are more than a mere technical obstacle to be circumvented if possible. In most cases, they are binding rules of law," *Tomanio*, supra, at 484. The underlying reason for this view was expressed as follow:

> This is obviously a judicial recognition of the fact that Congress, unless it has spoken to the contrary, did not intend by the mere creation of a "cause of action" or "claim for relief" that any plaintiff filing a complaint would automatically prevail if only the necessary elements of the federal substantive claim for relief could be established. *Id.*, at 488.

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8. *Burnett vs. Grattan*, supra, slip op. at 6; *Chardon vs. Soto*, 462 U.S. ____, No. 82-271 (June 20, 1983).

9. *Burnett vs. Grattan*, supra, slip op. at 11, n. 15; *Campbell vs. Haverhill*, 155 U.S. 610 (1895); *Johnson vs. Davis*, 582 F.2d 1316 (4th Cir. 1978).

Based on this reasoning, state policies of repose, in general, are not to be disfavored in federal law and the "borrowing" of state statutes of limitations in the context of Section 1983 suits should not be viewed as contravening the two principal policies embodied in the Civil Rights Act: "deterrence and compensation." *Ibid*. Rather, based on the Court's "prior opinions in this field" as well as considerations of federalism, the federal courts are to accord substantial weight to the significant policies underlying the state statute of limitations and should not consider such a statute " 'inconsistent' with federal law merely because the statute causes the plaintiff to lose the litigation." *Tomanio*, supra, at 489, 488 (citing *Robertson*, supra, at 593).

This reasoning, in turn, complements what was previously enunciated by the Court in *Johnson*, supra. That is, that state statutes of limitations represent the considered judgment of the state legislature "concerning the point at which the interests in favor of protecting valid claims are outweighed by the interest in prohibiting the prosecution of stale ones." *Id.*, at 463-464. See also *Chase Securities Corp. vs. Donaldson*, 325 U.S. 304, 313 (1945). The provisions of 42 U.S.C. Section 1988—that federal courts adjudicating civil rights claims are to refer to state law "when there is no specifically stated or otherwise relevant federal statute of limitations", *Johnson*, supra, at 462—reflects the intent of Congress that a federal court's reliance "on the state's wisdom in setting a limit", is proper. *Id.*, at 464.

Similarly, in *Robertson*, the Court rejected the approach that the broad relief sought to be afforded a Section 1983 plaintiff should permit him or her to prosecute an action in "disregard of the state law to which Section 1988 refers. . . ." *Robertson*, supra, at 593. Emphasizing this point, the Court reasoned:

> A state statute cannot be considered "inconsistent" with federal law merely because the statute causes the plaintiff to lose the litigation. If success of the

§1983 action were the only benchmark, there would be no reason at all to look to state law, for the appropriate rule would then always be the one favoring the plaintiff, and its source would be essentially irrelevant. But §1988 quite clearly instructs us to refer to state statutes; it does not say that state law is to be accepted or rejected based solely on which side is advantaged thereby. *Ibid.*

Historically, the Court has additionally rejected arguments that an actual consideration of federal policies by a state legislature was necessary for the application of a state limitation period to a federal claim, *McCluny vs. Silliman*, 3 Pet. 270, 277-278 (1830), or that a need for uniformity would "warrant displacement of state statutes of limitations for civil rights actions." *Tomanio*, supra, at 489. See also *Robertson*, supra, at 594, n. 11; *Johnson*, supra.[10]

10. Specifically, as noted by this Court in *Tomanio:*
Uniformity has also been cited as a federal policy which sometimes necessitates the displacement of an otherwise applicable state rule of law. (citation omitted). The need for uniformity, while paramount under some federal statutory schemes, has not been held to warrant displacement of state statutes of limitations for civil rights actions (citation omitted). *Tomanio*, supra, at 489.

For these reasons, considerations of "uniformity" should not control the decision in this case. Clearly, congressional reliance on state law, as provided by 42 U.S.C. Section 1988, presupposes lack of nationwide uniformity. *Robertson vs. Wegmann*, supra, at 594, n. 11. The same rationale should apply here. As Congress had no difficulty with the application of varying limitations for the very same cause of action brought in different states, it is not unreasonable to conclude that federal policy would be substantially undermined by the application of different limitation periods to different causes of action brought in the same forum. See, e.g., *Skehan vs. Board of Trustees*, 590 F.2d 470, 477 (3d Cir. 1978), cert. denied, 444 U.S. 832 (1979); *Davis vs. United States Steel Supply*, 581 F.2d 335, 337-341 (3d Cir. 1978); *Green vs. Ten Eyck*, 572 F.2d 1233 (8th Cir. 1978), where the courts analyzed various aspects of civil rights claims to determine the analogous state limitations periods and then applied different analogous periods to each separate claim.

Based on this reasoning, it would appear that only two standards for review of state limitation periods may logically be developed: (1) whether the state statute at issue discriminates against federal claimants as compared to those asserting analogous state law claims in state court or (2) whether the limitation period is so unreasonably short as to preclude effective access to the federal courts for the prosecution of civil rights claims. See *Campbell vs. Haverhill*, 155 U.S. 610, 615 (1895); *Burnett*, supra, slip op. at 11, n. 15; see also *Burnett*, supra, slip op. at 15 (Rehnquist, J., concurring).

For the reasons that follow, it is submitted that the Pennsylvania six-month statute of limitations applicable to certain actions against government officials—including claims of sex discrimination in employment—is neither discriminatory with respect to federal civil rights claims nor so short as to be inconsistent with the federal policies underlying the Civil Rights Act—compensation and deterrence. *Tomanio*, supra, at 488.

A. The Pennsylvania statute of limitations does not discriminate against federal civil rights actions.

The statute of limitations at issue in this case was enacted as part of a major, systematic revision and codification of Pennsylvania statutes relating to judicial actions and the judiciary, known as the Pennsylvania Judicial Code. See *Pennsylvania Bar Association Judicial Code Explanation*, 42 Pa.Cons.Stat., p. xi. The Code represented a "distillation of approximately 6,000 sections of Purdons' statutes enacted over a 277-year span." *Id.*, at xxxii. The General Assembly also determined to use the Code "as a vehicle to rationalize and simplify [the] statutes of limitations", (*Id.*, at xv) and, in doing so, generalized the six-month statute of limitations set forth in the Act of March 21, 1772 (1 Sm.L. 364), Section 7 (42 P.S. Section 1017, repealed) so that it became the residual statute of limitations for actions against public offi-

cers. 42 Pa.Cons.Stat. Section 5522, *Official Source Note*, at p. 24. See also *Pennsylvania Bar Association Judicial Code Explanation*, supra, at p. xv. As such, the statute of limitations at issue was clearly not enacted with any discriminatory intent or hostility towards federal civil rights actions.

The more cogent reason for finding that the Pennsylvania statute does not discriminate against federal claims is found in the holding of the Third Circuit below.[11] When the Third Circuit held it was the "analo-

11. The construction of the Pennsylvania limitation scheme as to which both the District Court and Circuit Court of Appeals were in agreement, is not now before the Court. However, that construction is significant. *Chardon vs. Soto*, 462 U.S. ____, No. 82-271 (June 20, 1983); *Propper vs. Clark*, 337 U.S. 472, 486-487 (1949). There, the Court described its hesitancy "to overrule decisions by Federal Courts skilled in the law of particular states unless their conclusions are shown to be unreasonable." *Id.* See also *Burnett* supra, slip op. at 14 (Powell, J., concurring); *Runyon vs. McCrary*, 427 U.S. 160, 181 (1976). Based on the authorities cited in the text, the judgment of the lower courts that the Pennsylvania six-month statute of limitations would govern this case had it been brought under state law in state court could not properly be characterized as "unreasonable". The conclusion of the lower courts with respect to this issue, therefore, should be accorded deference not only with respect to the applicability of the six-month period to this sort of case but also as to the equality of application of that statute to analogous state and federal claims alike. This conclusion is further buttressed by the nature and complexity of the Pennsylvania statutory limitation scheme. See generally, 42 Pa.Cons.Stat. Sections 5521, et seq. Specifically, the statutory scheme, conforming "to the modern principle that claims based on conduct, and hence heavily relying on unwritten evidence, should have relatively short statutes of limitations. . . ." (*Pennsylvania Bar Association Judicial Code Explanation*, supra, at p. xvi-xvii) consequently set the limitation period for libel, slander and invasion of privacy at one (1) year, 42 Pa.Cons.Stat. Section 5523; for assault, battery, false imprisonment, false arrest, malicious prosecution, malicious abuse of process, actions to recover damages for injury to the person or for wrongful death, or for the taking, detaining or injuring of personal property at two (2) years, 42 Pa.Cons.Stat. Section 5524; actions on certain contracts at four (4) years, 42 Pa.Cons.Stat. Section 5525,

gous" statute of limitations it concluded "that if (plaintiff) had brought her action in state court *under state law* it would have been subject to the six-month limitations period (citations omitted)." *Knoll*, supra, at 141 (emphasis added). Implicit in this finding was that state law and federal law claims were being treated equally. Where there is such equal treatment, there surely cannot be discrimination.[12]

For these reasons, the Pennsylvania six-month statute of limitations applicable to certain actions against public officials is unlike the Virginia one year statute of limitations expressly applicable to all Section 1983 actions which was rejected by the Court of Appeals for the Fourth Circuit in *Johnson vs. Davis*, 582 F.2d 1316 (4th Cir. 1978) (cited by this Court in *Burnett*, supra, slip op. at 11, n. 15) and there is no basis for the rejection of the Pennsylvania statute on the ground that it discriminates against federal civil rights actions.

etc. The Judicial Code also made the six-month limitation period applicable to petitions for the establishment of a deficiency judgment; actions under Section 6-111 of the Uniform Commercial Code (relating to limitations of actions and levies); and actions to enforce civil penalties against an employer for depriving an employee of employment or benefits or for threatening or otherwise coercing the employee because the employee was summoned to and served as an investigating grand juror. 42 Pa.Cons.Stat. Section 5522 b(2), (3), (4).

12. That the balance may in fact be tipped somewhat in favor of federal claimants is shown from an examination of the Pennsylvania Rules of Civil Procedure which require fact pleading rather than notice pleading as permitted by F.R.C.P. 8. Consequently, the burden of conducting a sufficient investigation and the drafting of pleadings meeting the requirements of the Pennsylvania procedural rules exceeds that which would be borne by a federal civil rights litigant. See Pa.R.Civ.P. 1019, 1041. 1061. 1091.

B. A state statute of limitations prescribing a six-month period for the commencement of certain judicial actions against public officials—including claims of employment discrimination on the basis of sex—provides a reasonable time for the commencement of such suits whether brought under state law or under Section 1983.

The six-month statute of limitations at issue is one which is expressly applicable to the commencement of judicial actions rather than administrative proceedings. It is a statute which would have barred this suit had it been commenced under state law in state court. *Knoll vs. School District of Springfield Township*, supra; *Clyde vs. Thornburgh*, supra; *Eshmont vs. Commonwealth*, supra. Although at first blush this aspect of the statute of limitations might seem relevant only to the second prong of the Section 1988 test—whether it is the appropriate statute (*Burnett*, supra, slip op. at 6)—it has been recognized by this Court that "the second and third steps of the Section 1988 inquiry shade into each other." *Id.*, slip op. at 11, n. 15.

Here, the limitation period applies to remedies judicially enforceable in the first instance, does not limit who may bring suit or the cause of action and does not preclude money damages or injunctive relief. For these reasons, its enactment should raise a presumption that the state legislature took into account the burdens borne by the parties to a suit governed by that limitation—the "practicalities involved in litigating federal civil rights claims. . . ." (*Burnett*, supra, slip op. at 8)—and found that limitation period reasonable. This judgment should be viewed as "more than a mere 'technical obstacle to be circumvented if possible.' (citation omitted)", *Tomanio*, supra, at 484, and should, "prima facie", be accorded deference by this Court. *Burnett*, supra, slip op. at 19 (Rehnquist, J., concurring).[13]

13. Historically, such deference has been accorded to state legislatures' determinations of limitations periods. See, for example, *Burrill vs. Locomobile Co.*, 258 U.S. 34 (1922); *Turner vs. New York*, 168 U.S. 90 (1897); *Mills vs. Scott*, 99 U.S. 25 (1878); *Terry vs. Anderson*, 95 U.S. 628 (1877). Although these cases did not arise in connection with suits brought under the federal civil rights acts, the issue in each of them was whether a state statute of limitation allowed an aggrieved party a reasonable time to sue. The thrust in each of the cases was that absent the provision of a reasonable time, the state limitation periods would be unconstitutional. The standard for measuring reasonableness applied in those cases should be viewed as analogous to the standard to be applied by the Court in this case.

The determination of the Pennsylvania state legislature that six months is a reasonable time within which to commence litigation—whether in state or federal court—is given support by the holding of the Court in *DelCostello vs. International Brotherhood of Teamsters*, 462 U.S. ____, No. 81-2386 (June 8, 1983). At issue in *DelCostello* was the appropriate statute of limitations to be applied to employees' suits against their employer and/or their union based on the employer's alleged breach of the collective bargaining agreement and the union's alleged breach of its duty of fair representation under the National Labor Relations Act. The cause of action in *DelCostello* was described as two claims "inextricably interdependent" in which the employee, to succeed against either the union or the company, had to establish both a breach of contract by the company and a breach of duty by the union. *DelCostello*, supra. Despite the complexity of the claim, the court applied a six-month statute of limitations to such actions. In this context only—to the extent that *DelCostello* impliedly recognized that a six-month limitation period was sufficient for the commencement of relatively complex federal litigation—the holding in *DelCostello* supports the judgment of the Pennsylvania State Legislature that the six-month period is reasonable here. See *Burnett*, supra, slip op. at 19-20 (Rehnquist, J., concurring). At the least, *DelCostello* cuts against any conclusion that the " 'practicalities' of litigation necessarily mean that a six-

month limitations period is an unreasonable time in which to bring a federal cause of action." *Burnett*, supra, slip op. at 20. (Rehnquist, J., concurring).[14]

Applying this reasoning to the present case, the six-month statute of limitations is reasonable. The nature of

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14. Similar conclusions have been reached by the several circuits (other than the Third Circuit in *Knoll*) which have squarely dealt with the question of whether a six-month state statute of limitations applicable to the commencement of judicial proceedings may properly be applied to civil rights actions. See *Hussey vs. Sullivan*, 651 F.2d 74 (1st Cir. 1981) (applying the Massachusetts statute of limitations for the commencement of judicial proceedings by a police officer alleging denial of promotion on improper grounds and seeking relief under 42 U.S.C. Section 1983, 1985 (3)); *Warner vs. Perrino*, 585 F.2d 171 (6th Cir. 1978) (applying Ohio's six-month statute of limitations for the commencement of a private judicial action by victims of housing discrimination to a Section 1982 claim). See also *Warren vs. Norman Realty Co.*, 513 F.2d 730 (8th Cir. 1975) and *Green vs. Ten Eyck*, 572 F.2d 1233 (8th Cir. 1978) (applying the 180-day limitation period for the commencement of judicial proceedings set forth in the Missouri discriminatory housing practices law to Section 1981 and 1982 claims without comment with respect to the reasonableness of the limitation period). Although the First Circuit determined that six-month limitations on the commencement of administrative proceedings were applicable to civil rights actions in *Burns vs. Sullivan*, 619 F.2d 99 (1st Cir. 1980), *Carter vs. Supermarkets General Corp.*, 684 F.2d 187 (1st Cir. 1982) and other cases which have been overruled by *Burnett*, supra, the First Circuit's reasoning that six months was not too short a period within which to commence judicial proceedings should still be seen as viable. See, e.g., *Hussey vs. Sullivan*, supra. This is the precise distinction that had been drawn by the Eighth Circuit prior to this Court's decision in *Burnett vs. Grattan*. Compare, *Warren vs. Norman Realty Co.*, supra, with *Chambers vs. Omaha Public School District*, 536 F.2d 222 (8th Cir. 1976) in which the Eighth Circuit rejected the application of a 180-day administrative limitation period noting that "Norman Realty drew a clear distinction between judicial and administrative avenues of relief." *Id.*, at 226. That the First Circuit lacked the prescience of the Eighth in this regard, should not undercut the soundness of its conclusion with respect to the reasonableness of a six-month limitation period.

the inquiry required to be made by this Court under Section 1988 is whether a state statute of limitations is "inconsistent" with the Constitution and laws of the United States, not whether this Court, if it were applying its own judgment, in the first instance, would adopt a limitations period equivalent to that adopted by the state legislature.

Where the state statute is applicable to the commencement of judicial proceedings, the legislature should be presumed to have taken "into account the burdens borne by the parties to a suit of that sort" and to have given due consideration to the precept that the "administration of justice is not well served by the filing of premature, hastily-drawn complaints." *Burnett*, supra, slip op. at 9 and at 8, n. 13. The legislature should also be presumed to have considered the interplay between the limitation period and the practicalities of litigation — the Plaintiff's recognition of the dimensions of the injury, the preparation involved, the need for counsel, the need for investigation, the payment of required filing fees and the filing and service of a complaint as well as the parties' responsibilities immediately following the commencement of suit. *Ibid.* For these reasons, arguments premised upon any asserted inadequacy of a six-month period based on these considerations, should be foreclosed. A contrary holding could be premised only upon this Court's substitution of its judgment for that of the legislature rather than an inquiry as to whether the result of the state legislature's judgment was inconsistent with the Constitution and laws of the United States. *Burnett*, supra, *Tomanio*, supra; *Robertson*, supra, *Johnson*, supra.

A similar disposition should be made with respect to any argument that there is a peculiarity to a Section 1983 action that should nevertheless preclude the application of the six-month limitation period. The acceptance of this type of argument would merely compound the problem by involving this Court not only with over-

ruling the judgment of the state legislature but also that expressed by Congress in Section 1988. *Johnson*, supra, at 464. Similarly, the acceptance of an argument that six months is too short for the commencement of federal claims generally would not only call into question the judgments of the state legislature and Congress but also the result reached by this Court in *DelCostello*, supra.[15]

For these reasons, there is no firm ground from which to draw a conclusion that a six-month limitation period applicable to certain Section 1983 claims is per se unreasonably short and the Court, therefore, should decline to overrule the judgment of the Pennsylvania State Legislature in that regard.

Even if the Court were to commence such an inquiry despite the apparent proscriptions imposed by Section 1988 and its own reasoning in prior cases, that inquiry would disclose no basis in the record of this case for finding that the six-month limitation period was unreasonable. Firstly, because the statute at issue is the residuary statute governing only certain actions against public officials, its applications are limited. Under Pennsylvania law it would not apply to actions — state or federal — sounding in defamation, assault and battery, personal

15. It should be noted that in the event of continuing violations, the Pennsylvania statute of limitations would not prevent deterrence of unlawful conduct by public officials or preclude federal courts from compelling them to "conform their practices to the nationally mandated policy of equal employment opportunity." *Johnson*, supra, at 467, n. 13. As noted in *Johnson*, present engagement in such conduct by public officials will necessarily mean that there are claimants now in a position either to file a Title VII charge or a Section 1983 suit. Thus, neither of the principal policies of Section 1983 are impaired by the Pennsylvania statute. Continuing violations can unquestionably be deterred under any circumstances. (Ibid.) Isolated violations will be deterred and compensation will be paid individual complainants if they "take the minimal steps necessary to preserve [their] claim", *Johnson*, supra, at 466, by the commencement of their suits within the applicable period. See *Tomanio*, supra, at 488, *Johnson*, supra, at 467, n. 13; *Robertson*, supra.

injury, or contract. See *Clyde vs. Thornburgh*, supra. See also *Polite vs. Diehl*, 507 F.2d 119, 122 (3d Cir. 1974) (en banc) (applying a Pennsylvania one-year statute to a Section 1983 claim analogous to false arrest and a two-year wrongful injury statute to claims analogous to assault and battery and the coercion of a guilty plea, under the pre-Judicial Code limitations schema.) Further, the type of injury alleged, its magnitude and consequences — the denial of appointment to a higher position and the consequent loss of increased pay, benefits and opportunities for future advancement — should have been easily and immediately recognizable (See *Delaware State College vs. Ricks*, 449 U.S. 250 (1980)), particularly in this case.[16] Certainly, all of these factors, together with the absence of any evidence or empirical data in the record to support a finding that a six-month period is unreasonably short, militate against such a finding.

Arguments that a six-month period is unreasonable also fail when balanced against the state policies sought to be fostered by statutes of limitations — policies which "have long been respected as fundamental to a well-ordered judicial system", *Tomanio*, supra, at 487, whether state or federal. *Tomanio*, supra, at 488. See also *Johnson*, supra; *Robertson*, supra. Here, because state and local governments are more likely to experience frequent changes in personnel than other employers, prompt assertion of claims is important. Because public officials' continued service is subject to the will of the electorate or the discretion of the elected officials who appoint them, even a short passage of time may result in the departure from government of the persons with

16. It should be noted that in a case such as this, the degrees and certifications held by each applicant as well as their respective experience, are matters of public record and that an individual applicant, therefore, knows or should know the merits of his or her credentials relative to the other applicants from the inception of the selection process.

knowledge of the circumstances surrounding the claim. This, in turn, would "impair the accuracy of the fact finding process." *Tomanio*, supra, at 487. Further, upon departure from government, former officials may be reluctant to cooperate fully, if at all, in the defense of claims burdening their successors or political opponents. Specifically with respect to cases involving discrimination in the hiring of public employees, each day of delay in commencing suit further establishes the person who was hired or promoted in place of the Complainant, in his or her position and entitles the hired or promoted employee to compensation, seniority, tenure and due process rights. Thus, in the event the public employer's conduct is ultimately found to be discriminatory, government service may be substantially disturbed, two salaries may be required to be paid for a single service and the public employer and the hired or promoted employee would have to commence the process of undoing the initial decision. With the prompt commencement of an action, a government employer would be better able to take steps to lessen or totally eliminate this problem. See *United States ex rel. Arant vs. Lane*, 429 U.S. 367, 372 (1919). The prompt assertion of the claims against the government will also promote sound finanical planning and permit the government to budget for the expenditures involved in defending against the claims or reimbursing successful claimants. These considerations in the context of this case, provide additional justification for respecting the state's choice.

Most significantly, the prompt assertion of claims by the filing of complaints of discrimination on the public record would foster deterrence of unlawful conduct by public officials. In addition to putting the governing body on notice[17] and, thus, enabling it to take corrective

17. The importance of notice of alleged, unlawful conduct is a recognized federal as well as state policy. See e.g., 42 U.S.C. Section 2000e-5(e); 117 Cong. Rec. 31972 (1971) (remarks of Rep. Erlenborn).

measures, prompt, well-founded accusations against public officials for discrimination in hiring or promotion on the basis of sex, would increase the likelihood that they would be accountable for their violations of the federal rights of others. If they are elected officials, and if the public knows of their conduct, it can respond at the next election by voting them out of office. If appointed officials are accused, the public body appointing them can respond by removing them from office. Absent prompt assertion of employment discrimination claims, no such sanction would be imposed upon the responsible officials who, in turn, could then continue their practices unnoticed.

CONCLUSION

For all of the foregoing reasons, the judgment of the Court of Appeals should be reversed. The Pennsylvania state six-month statute of limitations is applicable to this case. The statute applies uniformly to both state and federal claims alike. The time period for commencement of suit is not, per se, so unreasonably short as to effectively preclude an aggrieved person's access to the courts. The statute therefore should be "borrowed" under the provisions of 42 U.S.C. Section 1988 and applied to bar Respondent's Section 1983 claim in this case.

Respectfuly submitted,
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